

While [c]laimant does have an objective injury in the form of a torn meniscus, we have only [c]laimant's testimony that the meniscus tear occurred at work. None of the other, credible, evidence confirms that allegation. The medical evidence fails to establish the date of the meniscus tear. Indeed, [c]laimant now alleges a similar meniscus tear in the opposite knee which he attributes not to a single traumatic event, but to compensatory overuse from favoring the left knee. Claimant described

his activities after August 23 as staying home, elevating his leg and applying ice to his knee. Mr. [Robert] Kiser's testimony has [c]laimant visiting his [Mr. Kiser's] rental property on August 24 or 25, and navigating stairs in the process. Mr. York's testimony has [c]laimant describing a variety of activities in which he was engaged, including roofing, during the days between August 23 and August 28.

In the final analysis, [c]laimant does have a torn meniscus in his left knee. While he **could have** sustained that injury in just the manner that he describes and contends, it could have also arisen from his other non-work activities. The only evidence connecting that injury to a work-related accident on August 21, 2006 depends on [c]laimant's credibility, and that credibility is lacking.¹ (emphasis supplied)

Claimant has again appealed the Judge's denial and alleges that his additional witnesses both testified to seeing him limp at a point in time after the accident and *before* he was temporarily suspended from his job on August 23, 2006. Thus, claimant argues this testimony bolsters his position and further establishes that he must have sustained his knee injury on August 21, 2006 as he has alleged.

Conversely, respondent offered additional testimony of two individuals who both deny that claimant was limping when they saw him *after* August 23, 2006. And so respondent contends the ALJ appropriately denied claimant's request for benefits based upon the lack of proof of an accident arising out of and in the course of claimant's employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

As indicated above, this is the second time this claim has been before the Board. Claimant alleges he turned his left ankle and twisted his left knee at work at approximately 1:30 p.m. on August 21, 2006, when he stepped down from a pedestal onto a thick electrical cord. Claimant testified that within minutes of the accident he shouted to his lead man Mike Cramer, who had come to claimant's work area to fix a piece of equipment described as an auto dropper, that he had twisted his left knee. According to claimant, Mr. Cramer shrugged his shoulders, lifted his hands into the air, dropped his hands and went to work on the auto dropper.

Mr. Cramer denies that occurred. Moreover, Mr. Cramer testified he did not perform any work or work on any machinery on claimant's line on August 21. Mr. Cramer also testified he saw claimant walking on August 21, but did not see him limp. And he also saw

¹ P.H. Order (Apr. 23, 2007) at 5.

claimant walking a couple of times on August 22, but did not notice him having any problems.

Another of claimant's supervisors, Jim Barta, testified he did not see claimant limping until Wednesday afternoon, August 23, after claimant was advised he was being suspended for a performance issue. It was at that point that claimant notified Mr. Barta that he had hurt his knee.

Janene Cumberland, a human resources assistant employed by respondent, observed claimant walking on August 23, 2006, but did not notice him limping. Similarly, Jim York, the plant production manager, met with claimant on August 24, but did not notice any limping.

The difficulty in this case, indeed with many workers compensation cases, is that the parties' respective versions are diametrically opposed. Claimant makes a valid point in its brief to the Board when he argues that two facts are not in dispute. Claimant bears an objective injury to his knee (in fact to both knees) and that claimant advised Mr. Barta of his earlier accident at approximately 11:45 a.m. on August 23, 2006. Up until that point, there is no evidence that claimant engaged in any activity outside of work that might have led to his knee injury. He was performing his normal work duties up until the time he was disciplined for a performance issue. While meeting with claimant over the suspension, Mr. York testified that claimant told him he was going home to do some roofing work, but that comment was made *after* claimant told Mr. Barta he hurt his knee.

The most disturbing aspect of this claim is claimant's assertion that he continually limped after he injured his knee yet several of respondent's employees who saw him over a course of days at various times did not see such continuous limping. And the contemporaneous medical records do not substantiate claimant's purported obvious limp.

While this discrepancy might lead one to conclude that claimant is merely exaggerating his condition, it also bears upon his credibility. And the foundation for this claim is based upon claimant's assertion that he twisted his knee on August 21, 2006 when stepping down on an electrical cord. The event was not witnessed. Claimant says a co-worker was nearby and saw him struggle but that individual denies that took place. And like another Board Member, this member does not fault claimant for not immediately notifying his supervisor about the alleged event. Often times workers try to work through those events they view as minor. And they should not, as a rule, be punished for that decision. But here, the timing of the actual notification, coming on the heels of his suspension, coupled with the inconsistency of his limp, leads this Board Member to conclude that the Judge's preliminary hearing Order should be affirmed.

While others may view the evidence in a different light, this ALJ had the opportunity to observe and appreciate the credibility and demeanor of the claimant and some of the

other witnesses and at this juncture of the proceedings and based upon the evidence contained within the record thus far, this Board Member agrees with the ALJ.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.² Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 23, 2007, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2007.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

² K.S.A. 44-534a.